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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

[Docket No. 180411364-9092-02]

RIN 0648-BH90

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to National Park Service's Research and Monitoring Activities in Southern Alaska National Parks

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule; issuance of Letters of Authorization (LOA).

SUMMARY: NMFS, upon request from the National Park Service (NPS), hereby issues regulations to govern the unintentional taking of marine mammals incidental to research and monitoring activities in southern Alaska over the course of five years (2019-2024). These regulations, which allow for the issuance of Letters of Authorization (LOA) for the incidental take of marine mammals during the described activities and specified timeframes, prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, as well as requirements pertaining to the monitoring and reporting of such taking. In accordance with the Marine Mammal Protection Act (MMPA), as amended, and implementing regulations, notification is hereby additionally given that two LOAs have been issued to NPS to take marine mammals incidental to research and monitoring activities in southern Alaska national parks.

DATES: Effective from [*insert date of publication in the FEDERAL REGISTER*] through February 29, 2024.

FOR FURTHER INFORMATION CONTACT: Gray Redding, Office of Protected Resources, NMFS, (301) 427-8401.

SUPPLEMENTARY INFORMATION:

Availability

A copy of NPS’s application and any supporting documents, as well as a list of the references cited in this document, may be obtained online at:
<https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-research-and-other-activities>. In case of problems accessing these documents, please call the contact listed above (see **FOR FURTHER INFORMATION CONTACT**).

Purpose and Need for Regulatory Action

These regulations establish a framework under the authority of the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 *et seq.*) for authorizing the take of marine mammals incidental to NPS’s gull and climate monitoring activities within Glacier Bay National Park (GLBA NP) and marine bird surveys in the Southwest Alaska Inventory and Monitoring Network (SWAN) region. Researchers conducting these surveys may cause behavioral disturbance (Level B harassment) of harbor seals and Steller sea lions.

We received an application from NPS requesting five-year regulations and authorization to take harbor seals and Steller sea lions. Take is expected to occur by Level B harassment incidental to research and monitoring activities due to behavioral disturbance of pinnipeds. The regulations are valid from 2019 to 2024. Please see “Background” below for definitions of harassment.

Legal Authority for the Action

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1371(a)(5)(A)) directs the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region for up to five years if, after notice and public comment, the agency makes certain findings and issues regulations that set forth permissible methods of taking pursuant to that activity and other means of effecting the “least practicable adverse impact” on the affected species or stocks and their habitat (see the discussion below in the “Mitigation” section), as well as monitoring and reporting requirements. Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I, provide the legal basis for issuing this rule containing five-year regulations, and for any subsequent LOAs. As directed by this legal authority, the regulations contain mitigation, monitoring, and reporting requirements.

Summary of Major Provisions within the Regulations

The following provides a summary of some of the major provisions within the regulations for NPS’s research and monitoring activities in southern Alaska. We have determined that NPS’s adherence to the mitigation, monitoring, and reporting measures listed below will achieve the least practicable adverse impact on the affected marine mammals. They include:

- Measures to minimize the number and intensity of incidental takes during monitoring activities and to minimize the duration of disturbances;
- Measures designed to eliminate startling reactions; and

- Eliminating or altering research activities on GLBA NP beaches when pups are present, and setting limits on the frequency and duration of events during pupping season.

Background

Paragraphs 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1371 (a)(5)(A) and (D)) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s); will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant); and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined “negligible impact” in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival. NMFS has defined “unmitigable adverse impact” in 50 CFR 216.103 as an impact resulting from the specified activity:

- That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by:
 - Causing the marine mammals to abandon or avoid hunting areas;
 - Directly displacing subsistence users; or

- Placing physical barriers between the marine mammals and the subsistence hunters; and
- That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

Except with respect to certain activities not pertinent here, the MMPA defines “harassment” as any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Summary of Request

On February 6, 2018, we received an adequate and complete request from NPS for authorization to take marine mammals incidental to gull and climate monitoring activities in GLBA NP. On February 22, 2018 (83 FR 7699), we published a notice of receipt of NPS’s application in the **Federal Register**, requesting comments and information related to the request for 30 days. We did not receive any comments. NPS provided a revised application incorporating minor revisions on April 23, 2018. Subsequently, NPS has identified additional research and monitoring projects in southern Alaska (SWAN region) with similar sources of marine mammal disturbance and potential effects. On October 29, 2018, NMFS received an adequate and complete revised application including these additional research and monitoring activities. These additional activities were determined to be similar in scope and impact to the original proposed activities, and NMFS determined that publication of a revised notice of receipt was not necessary for the updated application. On December 13, 2018, NMFS published a notice of proposed rulemaking in the **Federal Register** (83 FR 64078), requesting comments for 32 days.

We received three comments which are summarized and addressed below (Comment and Responses).

Prior to this request for incidental take regulations and subsequent LOAs, we issued five consecutive incidental harassment authorizations (IHA) to NPS for incidental take associated with the GLBA NP ongoing gull and climate monitoring activities. NPS was first issued an IHA, valid for a period of one year, effective on September 18, 2014 (79 FR 56065), and was subsequently issued one-year IHAs for incidental take associated with the same activities, effective on March 24, 2015 (80 FR 28229), June 1, 2016 (77 FR 24471), May 20, 2017 (82 FR 24681), and February 15, 2018 (83 FR 6842). NPS has abided by all of NMFS's mitigation and monitoring requirements in previous activities for which take was authorized.

Authorization

This action also serves as a notice of issuance of two LOAs to NPS authorizing the take of marine mammals by Level B harassment incidental to research and monitoring activities with GLBA NP and the SWAN region. The level and type of take authorized by these LOAs is outlined in this preamble to the final rule, and any changes to the numbers of authorized takes are presented during the proposed rulemaking is explained within this document. Take by mortality or serious injury is not anticipated or authorized.

Description of the Specified Activity

A detailed description of the planned NPS project is provided in the **Federal Register** in the notice of proposed rulemaking (83 FR 64078; December 13, 2018). Since that time, no changes have been made to the planned NPS monitoring activities. Therefore, a detailed description is not provided here. Please refer to that **Federal Register** notice of proposed rulemaking for the description of the specific activity.

Glacier Bay

NMFS is issuing one LOA for two research projects NPS plans to conduct within the GLBA NP in southeast Alaska: 1) glaucous-winged gull monitoring, and 2) the maintenance of a weather station operation for long-term climate monitoring. NPS plans to conduct ground and vessel surveys at six study sites within GLBA NP for gull monitoring: South Marble Island, Boulder Island, Lone Island, Geikie Rock, Flapjack Island, and Tlingit Point Islet. These sites will be accessed up to five times per year. Two of these sites, South Marble Island and Tlingit Point Islet, have been accessed during previous research but have no documented harbor seal haulouts. Additionally, Steller sea lions are not found on the portion of South Marble Island accessed by GLBA NP researchers. In addition, NPS is requesting permission to access Lone Island an additional three times per year for weather station maintenance and operation bringing the total number of site visits to Lone Island to eight. Researchers accessing the islands for gull monitoring and weather station operation may cause behavioral disturbance (Level B harassment) of harbor seals. NPS expects that the disturbance to harbor seals from both projects will be limited to Level B harassment. Disturbance to Steller sea lions is not expected to occur as a result of implementation of mitigation measures.

The purpose for the above-mentioned research activities are as follows. Gull monitoring studies are mandated by a Record of Decision of a Legislative Environmental Impact Statement (LEIS) (NPS 2010) which states that NPS must initiate a monitoring program for glaucous-winged gulls (*Larus glaucescens*) to inform future native egg harvest by the Hoonah Tlingit in Glacier Bay, Alaska. Installation of a new weather station on Lone Island was conducted by the NPS in the spring of 2018 as one of several installations intended to fill coverage gaps among existing weather stations in GLBA NP (NPS 2015a). In order to properly maintain the newly

installed weather station, researchers must access the Lone Island weather station site at least twice a year for annual maintenance and repairs.

Southwest Alaska Inventory and Monitoring Network

NMFS is issuing a second LOA for the SWAN region marine bird multi-species nearshore surveys that NPS plans to conduct along the coastlines of Katmai National Park and Preserve (KATM), Kenai Fjords National Park (KEFJ), and in Kachemak Bay (KBAY) in support of long-term monitoring programs in these regions of southwest Alaska. Occasional disturbance of Steller sea lions and harbor seals may occur during surveys. Steller sea lion and harbor seal habitat coincides with surveyed nearshore transects. Please see NPS's application for established transect locations for KATM and KEFJ and proposed transect locations for KBAY. NMFS expects that the disturbance will be limited to Level B harassment and will not result in serious injury or death. SWAN also seeks to foster further collaborations with NOAA and share monitoring data in the future.

Comment and Responses

NMFS published a proposed rule in the **Federal Register** on December 13, 2018 (83 FR 64078). During the 32-day comment period on the proposed rule, NMFS received three comments, including one from the Marine Mammal Commission (Commission). All of these comments were generally in favor of issuing the rule, including the Commission's which recommended NMFS issue the final rule and subsequent LOAs, subject to inclusion of the proposed mitigation, monitoring, and reporting measures.

Comment 1: One comment requested further information about the research results the National Park Service has generated through their previous work NMFS has authorized incidental take for in GLBA NP.

Response: NMFS has not analyzed the results of NPS's research but refers the commenter to information provided by GLBA NP and NPS related to research in the park (<https://www.nps.gov/glba/learn/scienceresearch.htm>).

Comment 2: One comment raised general questions about the methods used to approach survey islands, suggesting the use of only non-motorized vessels, such as a row dingy or kayak. The commenter also suggested that gull monitoring trips and climate monitoring/weather station maintenance trips be combined to minimize approaches to Lone Island.

Response: NMFS has determined that the mitigation measures outlined in the "Mitigation" section are sufficient to minimize take of marine mammals during GLBA NP research and monitoring to the level of least practicable adverse impact, as required by the MMPA. GLBA NP researchers have a vested interest in minimizing the disturbance of their surveys and vessels approaches to insure that data they collect on glaucous-winged gulls is as representative as possible. As such, NMFS understands that researchers will make an appropriate decision on how to approach islands and conduct surveys balancing their research needs, safety, and desire to minimize disturbance. Additionally, the timing of the climate monitoring and weather station maintenance trips and the glaucous-winged gull surveys may not align based on research and maintenance needs, so NMFS feels it is not reasonable to require these trips be combined.

Description of Marine Mammals in the Area of the Specified Activity

A detailed description of the species likely to be affected by the NPS projects, including brief introductions to the species and relevant stocks as well as available information regarding population trends and threats, and information regarding local occurrence, are provided in NPS's application and the **Federal Register** notice of proposed rulemaking (83 FR 64078; December

13, 2018). We are not aware of any changes in the status of these species and stocks; therefore, detailed descriptions are not provided here. Please refer to that **Federal Register** notice of proposed rulemaking for these descriptions. Additional information regarding population trends and threats may be found in NMFS's Stock Assessment Reports (SAR; <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments>) and more general information about these species (e.g., physical and behavioral descriptions) may be found on NMFS's website (<https://www.fisheries.noaa.gov/find-species>).

While there are no changes in the status of these stocks, NMFS here provides additional information on the presence of Steller sea lions in GLBA NP which may not have been clear in the preamble to the proposed rule. In the preamble to the proposed rule, NMFS stated that Steller sea lions are not generally seen on the GLBA NP islands being researched, but this species is commonly seen year round on South Marble Island (Womble and Gende, 2010), one of the islands GLBA NP plans to survey, and has historically surveyed, for glaucous-winged gulls. These Steller sea lions have been present on South Marble Island during GLBA NP's previous research and monitoring, but no disturbance has been documented. In GLBA NP's research and monitoring, mitigation measures, including maintaining a 100 meter distance from all Steller sea lions, will help ensure no disturbance of Steller sea lions, as these measures have been proven successful in preventing disturbance during work carried out under previous IHAs.

Table 1 lists all species with expected potential for occurrence within the survey areas and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. For taxonomy, we follow the Committee on Taxonomy (2018). PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be

removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS’s SARs). While no mortality is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS’s stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS’s U.S. Alaska SARs (Muto *et al.*, 2018). All values presented in Table 1 are the most recent available at the time of publication and are available in the 2017 SARs (Muto *et al.*, 2018).

Table 1. Marine Mammals that Could Occur in the Project Area.

Common name	Scientific name	Stock	ESA/MMPA status; Strategic (Y/N) ¹	Stock abundance (CV, N _{min} , most recent abundance survey) ²	PBR	Annual M/SI ³
Order Carnivora – Superfamily Pinnipedia						
Family Otariidae (eared seals and sea lions)						
Steller sea lion	<i>Eumetopias jubatus</i>	Eastern U.S.	-/-; N	41,638 (n/a, 41,638, 2015) ⁴	306	236
		Western U.S.	E/D; Y	54,267 (n/a; 54,267; 2017) ⁴	326	252
Family Phocidae (earless seals)						
Harbor seal	<i>Phoca vitulina richardii</i>	Glacier Bay / Icy Strait	-/-; N	7,210 (n/a.; 5,647; 2011) ⁴	169	104

		Cook Inlet/Shelikof Strait	-/-; N	27,386 (n/a; 25,651; 2011) ⁴	770	234
		Prince William Sound	-/-; N	29,889 (n/a; 27,936; 2011) ⁴	838	279

1 - Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

2- NMFS marine mammal stock assessment reports online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments>. CV is coefficient of variation; Nmin is the minimum estimate of stock abundance. In some cases, CV is not applicable (n/a)

3 - These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (e.g., commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range.

4 - CV value not reported in SARs

All marine mammal species that could potentially occur in the proposed survey areas are included in Table 1. While cetaceans, including humpback, beluga, and killer whales, may be present in nearby waters, NPS's activities are expected to result in harassment only for hauled out pinnipeds. Therefore, cetaceans are not considered further in this analysis. However, NPS does include avoidance measures for cetaceans, described in the "Mitigation" section below. Finally, sea otters may be found throughout the planned project area. However, sea otters are managed by the U.S. Fish and Wildlife Service and are not considered further in this document.

Effects of the Specified Activity on Marine Mammals and Their Habitat

The proposed rule (83 FR 64078; December 13, 2018) included a discussion of the effects of disturbance on marine mammals and their habitat, therefore that information is not repeated here; please refer to the **Federal Register** notice of proposed rulemaking (83 FR 64078; December 13, 2018) for that information. We provide only a summary here.

The NPS's research and monitoring activities in GLBA NP and the SWAN region are not expected to have permanent impacts on marine mammals or the habitats used directly by marine mammals, such as haulout sites, nor are there expected to be measurable impacts to food sources.

Based on the available data, previous monitoring reports from GLBA NP, and studies described in the preamble to the proposed rule, we anticipate that any pinnipeds found in the vicinity of the projects could have short-term behavioral reactions (*i.e.*, may result in marine mammals avoiding certain areas) due to noise and visual disturbance generated by: (1) motorboat approaches and departures; (2) motorboat coastal transit; and (3) human presence during gull research activities. We expect pinnipeds to return to a haulout site within minutes to hours of the stimulus based on previous research (Johnson and Acevedo-Gutierrez, 2007; Allen *et al.*, 1985). Pinnipeds may be temporarily displaced from their haulout sites, but we do not expect that the pinnipeds will permanently abandon a haulout site during site monitoring as activities are short in duration (brief transit through an area to up to 2 hours), and previous surveys at GLBA NP have demonstrated that pinnipeds have returned to their haulout sites and have not permanently abandoned the sites.

Marine Mammal Habitat

NMFS does not anticipate that the planned activities in GLBA NP or the SWAN region will result in any measurable effects on the habitats used by the marine mammals in the planned area, including the food sources they use (*i.e.*, fish and invertebrates). The main impact associated with the planned activity will be temporarily elevated noise levels from motorboats and human disturbance on marine mammals potentially leading to temporary displacement from a site, previously discussed in the proposed rule. NPS' LEIS for gull monitoring surveys in GLBA NP concluded that the activities do not result in the loss or modification to marine mammal habitat (NPS 2010). Additionally, any minor habitat alterations stemming from the maintenance of NPS' weather station will be located in an area that will not impact marine mammals. SWAN's activities in KATM and KEFJ do occur in Steller sea lion critical habitat,

but will have minimal impact due to the nature of the disturbance and explicit avoidance of the most sensitive areas (rookeries). In all, the activities in both GLBA NP and the SWAN region will not result in any permanent impact on habitats used by marine mammals, including prey species and foraging habitat.

Estimated Take

This section provides an estimate of the number of incidental takes that may be authorized through LOAs issued under this rule, which will inform both NMFS's consideration of whether the number of takes is "small" and the negligible impact determination. During the comment period for the proposed rule, NMFS was made aware that the number of authorized annual takes by Level B harassment for SWAN activities does not adequately account for both summer and winter surveys at each of the KATM, KEFJ, and KBAY sites. As stated in the preamble to the proposed rule, NMFS estimates that 100 harbor seals and 100 Steller sea lions could be disturbed during each survey of KATM and KEFJ. For KBAY, NMFS estimated that 100 harbor seals could be disturbed during each survey, but no Steller sea lions are present at that survey site, so none would be disturbed. Accordingly, NMFS has increased the authorized annual takes by Level B harassment for SWAN activities to 600 harbor seals and 400 Steller sea lions to account for the 6 authorized surveys each year (1 summer and 1 winter at each of the 3 sites). This is a doubling of the authorized takes by Level B harassment presented in the proposed rule, originally 300 harbor seals and 200 Steller sea lions annually.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines "harassment" as any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to

disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes are by Level B harassment only, in the form of disruption of behavioral patterns for individual marine mammals resulting from exposure to motorboats and the presence of NPS personnel. Based on the nature of the activity and mitigation measures, Level A harassment is neither anticipated nor authorized. As described previously, no mortality is anticipated or authorized for this activity. Below we describe how the take is estimated.

Glacier Bay

In GLBA NP, harbor seals may be disturbed when vessels approach or researchers go ashore for the purpose of monitoring gull colonies and for the maintenance of the Lone Island weather tower. Harbor seals tend to haul out in small numbers at study sites. Using monitoring report data from 2015 to 2017 (see raw data from Tables 1 of the 2017, 2016 and 2015 Monitoring Reports, which are available online at:

<https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-research-and-other-activities>), the average number of harbor seals per survey visit was calculated to estimate the approximate number of seals observers are expected to find on any given survey day. As a result, the following averages were determined for each island: Boulder Island – average 3.45 seals, Flapjack Island – average 10.10 seals, Geikie Rock – average 9.58 seals, and Lone Island average of 18.64 seals (reduced from 18.91 as this number stated in the notice of proposed rulemaking was based on an error in monitoring data) (See Table 2). Estimated take for gull and climate monitoring was calculated by multiplying the average number of seals observed during past gull monitoring surveys (2015-2017) by the number of

total site visits. As mentioned previously, no take is authorized for visits to South Marble Island or Tlingit Point Islet because the absence of pinnipeds on the relevant portions of the islands and implementation of mitigation measures means no take is expected to occur. This includes five annual visits to Boulder Island, Flapjack Island, and Geikie Rock and eight annual visits to Lone Island (to include three site visits for climate monitoring activities). Therefore, the total estimated annual incidents of harassment equals 265 which totals to 1,325 takes during the entire five years of the planned activities in GLBA NP (See Table 2).

During climate monitoring, which is expected to take place from March to April and October to February, seal numbers are expected to dramatically decline within the action area. Although harbor seal survey data within GLBA NP is lacking for the months of October through February, results from satellite telemetry studies suggest that harbor seals travel extensively beyond the boundaries of GLBA NP during the post-breeding season (September-April) (Womble and Gende, 2013b). Therefore, using the latest observation data from past gull monitoring activities (that occurred from May to September) is applicable when estimating take for climate monitoring activities, as it will provide the most conservative estimates.

Table 2. Proposed takes by Level B harassment during NPS gull and climate monitoring surveys.

Site proposed for survey	Average number of seals observed Per Visit¹	Number of proposed site visits	Proposed Level B harassment^{1*}	Percentage of Population³
Boulder Island	3.45 seals	5	17.25	0.24
Flapjack Island	10.10 seals	5	50.50	0.70
Geikie Rock	9.58 seals	5	47.90	0.66
Lone Island	18.64 seals	8 ²	149.12	2.06
Annual Total			265	3.68

¹Data from 2015-2017 NPS gull surveys (NPS 2015b; NPS 2016; NPS 2017).

²Number includes three additional days for climate monitoring activities.

¹See Table 3 in the notice of proposed rulemaking (83 FR 64078, December 13, 2018) for NMFS' three-point scale that categorizes pinniped disturbance reactions by severity. NMFS only considers responses falling into Levels 2 and 3 as harassment (Level B Take) under the MMPA.

³Based on the percentage of the Glacier Bay/Icy Strait stock of harbor seals that are proposed to be taken by Level B harassment during the NPS's proposed gull and climate monitoring activities.

*Values in this column have been adjusted slightly from the proposed rulemaking to correct rounding errors.

SWAN

Harbor seals and Steller sea lions may be disturbed by vessel presence, movement, or noise during the execution of SWAN's survey transects. The estimated number of takes by Level B harassment included in Table 3 are based on numbers of pinnipeds observed from a similar survey of KATM and KEFJ in 2013. In this survey, researchers observed an estimated 100 harbor seals and 100 Steller sea lions during each of the KATM and KEFJ surveys. Based on these findings, each survey of KBAY is expected to observe 100 harbor seals, but no Steller sea lions because the species is not generally found there. Data from 2013 surveys were used to estimate take because in 2013, most of the transects were able to be completed. Thus, 2013 data offers the most conservative count-based estimate. Based on pinnipeds observed in 2013, NPS estimates that each year, across the three survey sites, and two seasons of potential sampling, SWAN's activities will result in take by Level B harassment of 600 harbor seals and 400 Steller sea lions. In total, these figures result in an estimated 3000 harbor seal and 2000 Steller sea lion takes by Level B harassment across the five years. Annually, there would be 400 harbor seal takes by Level B harassment in the Cook Inlet/Shelikof Strait stock (KATM and KBAY surveys), and 200 harbor seal takes by Level B harassment from the Prince William Sound stock (KEFJ surveys). For Steller sea lion takes by Level B harassment, NPS estimates that 200 individuals will experience take by Level B harassment each year (across summer and winter) in both KATM and KEFJ (400 total), but no takes will occur in KBAY surveys. For simplicity, NMFS assumes and analyzes the impacts of the full Steller sea lion take on both the eastern and western stocks. Because these estimates are based on observations of pinnipeds and not

harassments, NMFS considers the estimated numbers of take by Level B harassment presented in Table 3 conservative.

Table 3. Proposed takes by Level B harassment due to SWAN's research and monitoring activities.

Species	Stock	Proposed Level B Take (annual)	Total Level B Takes in 5 Years	Percentage of Population over 1 year ¹
Harbor seal	Cook Inlet /Shelikof Strait	400	2000	1.4%
	Prince William Sound	200	1000	0.7%
Steller sea lion	Western	400 ²	2000 ²	0.7% ²
	Eastern	400 ²	2000 ²	1.0% ²

¹Based on the population size of each relevant stock as presented in Table 1.

²NMFS is only proposing to authorize 400 annual (2000 over 5 years) takes by Level B harassment for Steller sea lions, but is analyzing this take as fully coming from each of the U.S. Steller sea lion stocks.

Effects of Specified Activities on Subsistence Uses of Marine Mammals

The availability of the affected marine mammal stocks or species for subsistence uses may be impacted by this activity, though this is not an anticipated outcome. The subsistence uses that may be affected and the potential impacts of the activity on those uses are described below. Measures included in these regulations to reduce the impacts of the activity on subsistence uses are identical to those which minimize disturbance of pinnipeds as described in the *Mitigation* section. Last, the information from this section and the *Mitigation* section is analyzed to determine whether the necessary findings may be made in the *Unmitigable Adverse Impact Analysis and Determination* section.

Subsistence harvest of pinnipeds is prohibited in GLBA NP, KATM, and KEFJ but it does occur in nearby areas outside park boundaries. Native communities near KBAY, including

Homer, Seldovia, Nanwalek, and Port Graham harvested an estimated 32 harbor seals and 3 Steller sea lions in 2007 (Wolfe *et al.* 2009). It is not known exactly where these pinnipeds were harvested but some of them could potentially have been harvested in KBAY. 2007 harvest of both Steller sea lions and harbor seals was at a low point in June and July when SWAN's surveys are expected to occur in KBAY. Additionally, the disturbance to pinnipeds caused by NPS's activities is limited to non-lethal take by Level B harassment and is temporary and short in duration. Because the subsistence harvest is separated in time and space from NPS's planned activities, and the disturbance should not result in anything other than short term (minutes to hours) avoidance of haulouts, there should be no impacts on subsistence harvest.

Mitigation

In order to issue an incidental take authorization (ITA) under section 101(a)(5)(A) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, "and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking" for certain subsistence uses. NMFS regulations require applicants for ITAs to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as on subsistence uses where applicable, we carefully consider two primary factors:

1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned) the likelihood of effective implementation (probability of implementing as planned); and

2) The practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

Glacier Bay

NPS has based the mitigation measures for the planned research on the following: (1) protocols used during previous gull research activities as required by our previous authorizations for these activities; and (2) recommended best practices in Womble *et al.* (2013a); Richardson *et al.* (1995); and Weir and Dolman (2007).

To reduce the potential for disturbance from acoustic and visual stimuli associated with gull and climate monitoring activities within GBLA NP, NPS will implement the following mitigation measures for marine mammals:

Pre-Survey Monitoring

Before all surveys, the lead NPS biologist will instruct additional survey crew on appropriate conduct when in the vicinity of hauled-out marine mammals. This training shall brief survey personnel on marine mammals (inclusive of identification as needed, *e.g.*, neonates). Prior to deciding to land onshore to conduct gull and climate monitoring, the researchers will use

high-powered image stabilizing binoculars from the watercraft to document the number, species, and location of hauled-out marine mammals at each island. The vessels are expected to maintain a distance of 328 to 1,640 ft (100 to 500 m) from the shoreline to allow the researchers to conduct pre-survey monitoring. If offshore predators, harbor seal pups of less than one week of age (*i.e.*, neonates), or Steller sea lions are observed, researchers will follow the protocols for site avoidance discussed below. If neither of these instances occur, researchers will then perform a controlled landing on the survey site.

Site Avoidance

If a harbor seal pup less than one week old (*i.e.*, neonates) or a harbor seal predator (*i.e.*, killer whale) is observed near or within the action area, researchers will not go ashore to conduct gull or climate monitoring activities. Also, if Steller sea lions are observed within or near the study site, researchers will maintain a distance of at least 100 m from the animals at all times.

Controlled Landings

The researchers will determine whether to approach an island study site based on type of animals present. Researchers will approach the island by motorboat at a speed of approximately 2 to 3 knots (2.3 to 3.4 mph). This is expected to provide enough time for any harbor seals present to slowly enter the water without panic (flushing). The researchers will also select a pathway of approach farthest from the hauled-out harbor seals to minimize disturbance.

Minimize Predator Interactions

During pre-survey monitoring on approach to a site, NPS will observe the surrounding area for predators. If the researchers visually observe marine predators (*i.e.*, killer whales) present within a one mile radius of hauled-out marine mammals, the researchers will not approach the study site.

Disturbance Reduction Protocols

While onshore at study sites, the researchers will remain vigilant for hauled-out marine mammals. If marine mammals are present, the researchers will move slowly and use quiet voices to minimize disturbance to the animals present.

Avoidance of Unauthorized Take

While conducting activities at GLBA NP NPS will avoid interaction with marine mammal species that are either not authorized for take (including humpback whales and killer whales) or a species with all authorized takes met. NPS avoidance measures for humpback whales and killer whales will include not operating a motor vessel within 1/4 nautical mile of these cetaceans. If accidentally positioned within 1/4 nautical mile of a humpback or killer whale, researchers will slow the vessel speed to 10 knots or less and maintain course away from the marine mammal until at least 1/4 nautical mile of separation exists. For humpback whales, these avoidance measures are required by regulations (81 FR 62018; September 8, 2016).

SWAN

NPS has based the mitigation measures for SWAN on the following: (1) protocols used during previous authorizations for similar GLBA NP research; (2) recommended best practices in Womble *et al.* (2013a); Richardson *et al.* (1995); and Weir and Dolman (2007); and (3) experience of SWAN researchers in previous surveys.

To reduce the potential for disturbance from acoustic and visual stimuli associated with SWAN's surveys, NPS will implement the following mitigation measures for marine mammals:

Disturbance Reduction Protocols

While surveying study sites, the researchers will maintain a vessel distance of 100 to 150 m from shorelines at all times. If hauled-out Steller sea lions and harbor seals are observed, the

survey will maintain speed and minimum distance from the haulout to avoid startling.

Additionally the survey will be attempted from a distance greater than 150 m, if conditions allow proper execution of the survey at that distance.

Rookery Avoidance

SWAN will avoid transects that pass known Steller sea lion rookery beaches in order to minimize disturbance of these rookeries and the surrounding critical habitat.

Avoidance of Unauthorized Take

While conducting SWAN survey activities NPS will avoid interaction with marine mammal species that are either not authorized for take (including humpback whales and beluga whales) or a species with all authorized takes met. NPS avoidance measures for humpback whales and beluga whales will include not operating a motor vessel within 1/4 nautical mile of these cetaceans. If accidentally positioned within 1/4 nautical mile of a humpback or beluga whale, researchers will slow the vessel speed to 10 knots or less and maintain course away from the whale until at least 1/4 nautical mile of separation exists. For humpback whales, these avoidance measures are required by regulations (81 FR 62018; September 8, 2016).

Mitigation Conclusions

Based on our evaluation of the applicant's planned measures, as well as other measures considered by NMFS, NMFS has determined that the planned mitigation measures provide the means of effecting the least practicable impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, areas of similar significance, and on the availability of such species or stock for subsistence uses.

Monitoring and Reporting

In order to issue an ITA for an activity, section 101(a)(5)(A) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.*, presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (*e.g.*, source characterization, propagation, ambient noise); (2) affected species (*e.g.*, life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.*, age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;

- Effects on marine mammal habitat (*e.g.*, marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and
- Mitigation and monitoring effectiveness.

SWAN

NPS will conduct marine mammal monitoring during the SWAN activities, in order to implement the mitigation measures that require real-time monitoring and to gain a better understanding of marine mammals and their impacts to the project's activities. Because the activity is a survey of marine birds and mammals in the area, researchers will naturally be monitoring the area for pinnipeds or other marine mammals during all activities. Monitoring activities will consist of conducting and recording observations of pinnipeds within the vicinity of the research areas. The monitoring notes will provide dates, transect location, species, numbers of animals present within the transect, and numbers of pinnipeds that flushed into the water.

The method for recording disturbances follows those in Mortenson (1996). For NPS' activities in the SWAN region, pinniped disturbances will be based on a three-point scale that represents an increasing response to the disturbance. Because SWAN surveys are conducted at speed, researchers will be able to record the total number of each pinniped species observed and the number of Level 3 (Flushing) responses that occur, but not other, less noticeable disturbance responses.

SWAN does not have previous monitoring aimed specifically at recording and quantifying marine mammal disturbance. Similarity between the GLBA NP and SWAN activities for these regulations suggest mitigation measures based on relevant portions of

previous GLBA NP authorizations will provide the means of effecting the least practicable impact on the species or stock in the SWAN activity.

GLBA NP

In the preamble to the proposed regulations, it was stated that NPS will report the number of animals that moved greater than one meter. After consultation with the Commission, NMFS has requested that this criteria for recording a Level 2 disturbance reaction, and associated take by Level B harassment, be updated to a movement greater than two body lengths. This criteria aligns with NMFS's three point scale (see Table 3 in the preamble to the proposed regulations) that categorizes pinniped disturbance reactions by severity and captures what reaction NMFS considers to rise to the level of harassment.

NPS will conduct marine mammal monitoring during the present GLBA NP project, in order to implement the mitigation measures that require real-time monitoring and to gain a better understanding of marine mammals and their impacts to the project's activities. In addition, NPS's monitoring plan is guiding additional monitoring effort designed to answer questions of interest regarding pinniped usage of GLBA NP haulouts and the effects of NPS's activity on these local populations. The researchers will monitor the area for pinnipeds during all research activities. Monitoring activities will consist of conducting and recording observations of pinnipeds within the vicinity of the research areas. The monitoring notes will provide dates, location, species, the researcher's activity, behavioral state, numbers of animals that were alert or moved greater than two body lengths, and numbers of pinnipeds that flushed into the water.

The method for recording disturbances follows those in Mortenson (1996). NPS activities in GLBA NP will record pinniped disturbances on a three-point scale that represents an increasing response to the disturbance. Both a level 2 and level 3 response will be recorded as a

take by Level B harassment. NPS will record the time, source, and duration of the disturbance, as well as an estimated distance between the source and haulout.

Previous Monitoring Results

NPS has complied with the monitoring requirements under the previous GLBA NP authorizations. NMFS posted the 2017 report on our website at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-research-and-other-activities> and the results from the previous NPS monitoring reports support our findings that the mitigation measures required under the 2014 - 2017 Authorizations provide the means of effecting the least practicable impact on the species or stock in the GLBA NP activity. During the last 3 years of GLBA NP activity, approximately a third of all observed harbor seals have flushed in response to these activities (37 percent in 2015, 37 percent in 2016, and 38 percent in 2017). The following narratives provide a detailed account of each of the past 3 years of monitoring for the GLBA NP activity (Summarized in Table 4):

In 2017, of the 86 harbor seals that were observed: 33 flushed in to the water, 0 became alert but did not move >1 m, and 0 moved >1 m but did not flush into the water. In all, no harbor seal pups were observed. On two occasions, harbor seals were flushed into the water when islands were accessed for gull surveys. In these instances, the vessel approached the island at a very slow speed and most of the harbor seals flushed into the water at approximately 150 - 185 m. On two events, harbor seals were observed hauled-out on Boulder Island and not disturbed due to their distance from the survey area. In addition, during two pre-monitoring surveys conducted for Lone Island, harbor seals were observed hauled-out and the survey was not conducted to prevent disturbance of harbor seals.

In 2016, of the 216 harbor seals that were observed: 77 flushed in to the water; 3 became alert but did not move >1 m, and 17 moved >1 m but did not flush into the water. On five occasions, harbor seals were flushed into the water when islands were accessed for gull surveys. In these instances, the vessel approached the island at a very slow speed and most of the harbor seals flushed into the water at approximately 50-100 m. In four instances, fewer than 25 harbor seals were present, but in one instance, 41 harbor seals were observed flushing into the water when NPS first saw them as they rounded a point of land in kayaks accessing Flapjack Island. In five instances, harbor seals were observed hauled-out and not disturbed due to their distance from the survey areas.

In 2015, of the 156 harbor seals that were observed: 57 flushed in to the water; 25 became alert but did not move >1 m, and 0 moved >1 m but did not flush into the water. No pups were observed. On 2 occasions, harbor seals were observed at the study sites in numbers <25 and the islands were accessed for gull surveys. In these instances, the vessel approached the island at very slow speed and most of the harbor seals flushed into water at approximately 200 m (Geikie 8/5/15) and 280 m (Lone, 8/5/15). In one instance, (Lone, 6/11/15) NPS counted 20 harbor seals hauled-out during the initial vessel-based monitoring, but once on the island, NPS observed 33 hauled-out seals. When NPS realized the number of seals present, they ceased the survey and left the area, flushing 13 seals into the water.

Table 4. Summary Table of 2015-2017 Monitoring Reports for NPS Gull Studies.

Monitoring Year	Number of Adults Observed	Number of Pups Observed	Flushed into water	Moved >1 m but did not flush	Alert but did not move >1 m	Level B Take Authorized for Activity	Level B Take Recorded During Activities
2017	86	0	33	0	0	218	33
2016	216	1	77	3	17	500	80
2015	156	0	57	0	25	500	57

Coordination

NPS can add to the knowledge of pinnipeds in the action area by noting observations of: (1) unusual behaviors, numbers, or distributions of pinnipeds, such that any potential follow-up research can be conducted by the appropriate personnel; (2) tag-bearing carcasses of pinnipeds, allowing transmittal of the information to appropriate agencies and personnel; and (3) rare or unusual species of marine mammals for agency follow-up.

Glacier Bay

NPS actively monitors harbor seals at breeding and molting haulout locations to assess trends over time (*e.g.*, Mathews & Pendleton, 2006; Womble *et al.* 2010, Womble and Gende, 2013b). NPS's monitoring plan is guiding additional monitoring effort designed to answer questions of interest regarding pinniped usage of GLBA NP haulouts and the effects of NPS's activity on these local populations. This monitoring program involves collaborations with biologists from the Alaska Department of Fish and Game, and the NMFS Alaska Fisheries Science Center. NPS will continue these collaborations and encourage continued or renewed monitoring of marine mammal species. NPS will coordinate with state and Federal marine mammal biologists to determine what additional data or observations may be useful for monitoring marine mammals and haulouts in GLBA NP. Additionally, NPS will report vessel-based counts of marine mammals, branded, or injured animals, and all observed disturbances to the appropriate state and Federal agencies.

SWAN

While NPS's main focus is to monitor marine birds in the SWAN region, their survey efforts will incidentally record sightings of marine mammals. This data can add to understanding of pinniped regional distribution and population trends. NPS will also coordinate

with state and Federal marine mammal biologists to determine what additional data or observations may be useful to record for monitoring marine mammals and haulouts in the SWAN survey areas.

SWAN has been conducting nearshore coastal surveys along the KATM and KEFJ since 2006 and 2007, respectively (Coletti et al, 2018). SWAN collaborates closely with U.S. Geological Survey, U.S. Fish and Wildlife Service, the University of Alaska Fairbanks and others under the Gulf Watch Alaska (<https://www.gulfwatchalaska.org/>) program, primarily funded by the Exxon Valdez Oil Spill Trustee Council. SWAN will continue these collaborations and encourage continued or renewed monitoring of marine birds and other incidentally observed species. Additionally, NPS will report vessel-based counts of marine mammals, branded or injured animals, and all observed disturbances to state and Federal agencies.

Reporting

SWAN and GLBA NP are each required to submit separate draft annual reports on all activities and marine mammal monitoring results to NMFS within ninety days following the end of its monitoring period. These reports will include a summary of the information gathered pursuant to the monitoring requirements set forth in the Authorization. SWAN and GLBA NP will submit final reports to NMFS within 30 days after receiving comments on the draft report. If SWAN or GLBA NP receive no comments from NMFS on the report, NMFS will consider the draft report to be the final report. NPS will also submit a comprehensive 5-year report covering all activities conducted under the incidental take regulations 90 days following expiration of these regulations or, if new regulations are sought, no later than 90 days prior to expiration of the regulations.

Each report will describe the operations conducted and sightings of marine mammals near the project. The report will provide full documentation of methods, results, and interpretation pertaining to all monitoring. The report will provide:

1. A summary and table of the dates, times, and weather during all research activities;
2. Species, number, location, and behavior of any marine mammals observed throughout all monitoring activities;
3. An estimate of the number (by species) of marine mammals exposed to acoustic or visual stimuli associated with the research activities; and
4. A description of the implementation and effectiveness of the monitoring and mitigation measures of the Authorization and full documentation of methods, results, and interpretation pertaining to all monitoring.

In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by the authorization, such as an injury (Level A harassment), serious injury, or mortality (*e.g.*, vessel-strike, stampede, etc.), NPS shall immediately cease the specified activities and immediately report the incident to the Office of Protected Resources, NMFS and the Alaska Regional Stranding Coordinator. The report must include the following information:

- Time, date, and location (latitude/longitude) of the incident;
- Description and location of the incident (including tide level if applicable);
- Environmental conditions (*e.g.*, wind speed and direction, Beaufort sea state, cloud cover, and visibility);
- Description of all marine mammal observations in the 24 hours preceding the incident;

- Species identification or description of the animal(s) involved;
- Fate of the animal(s); and
- Photographs or video footage of the animal(s) (if equipment is available).

NPS shall not resume its activities until NMFS is able to review the circumstances of the prohibited take. NMFS will work with NPS to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. NPS may not resume their activities until notified by us via letter, email, or telephone.

In the event that NPS discovers an injured or dead marine mammal, and the lead researcher determines that the cause of the injury or death is unknown and the death is relatively recent (*i.e.*, in less than a moderate state of decomposition as we describe in the next paragraph), NPS will immediately report the incident to the Office of Protected Resources, NMFS and the Alaska Regional Stranding Coordinator. The report must include the same information identified in the paragraph above. Activities may continue while we review the circumstances of the incident. We will work with NPS to determine whether modifications in the activities are appropriate.

In the event that NPS discovers an injured or dead marine mammal, and the lead visual observer determines that the injury or death is not associated with or related to the authorized activities (*e.g.*, previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), NPS will report the incident to the incident to the Office of Protected Resources, NMFS and the Alaska Regional Stranding Coordinator within 24 hours of the discovery. NPS researchers will provide photographs or video footage (if available) or other documentation of the stranded animal sighting to us. NPS can continue their research activities.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.*, population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be “taken” through harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.*, intensity, duration), the context of any responses (*e.g.*, critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS’s implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.*, as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

During these activities, harbor seals and Steller sea lions may exhibit behavioral modifications, including temporarily vacating the area during the proposed research and monitoring activities to avoid human and vessel disturbance. However, due to the project’s minimal levels of visual and acoustic disturbance (Level B harassment only), NMFS does not expect NPS’s specified activities to cause long-term behavioral disturbance, abandonment of the haulout area, injury, serious injury, or mortality. In addition, while a portion of these activities are expected to take place in areas of significance for marine mammal feeding, resting, breeding,

or pupping, there are no expected adverse impacts on marine mammal habitat as discussed above. Due to the nature, degree, and context of the behavioral harassment anticipated, we do not expect the activities to impact annual rates of recruitment or survival.

NMFS does not expect pinnipeds to permanently abandon any area surveyed by NPS researchers, as is evidenced by continued presence of pinnipeds at the GLBA NP sites during annual gull and climate monitoring. NMFS anticipates that impacts to hauled-out harbor seals and Steller sea lions during NPS' research and monitoring activities will be behavioral harassment of limited duration (*i.e.*, up to two hours per site visit) and limited intensity (*i.e.*, temporary flushing at most).

In summary and as described above, the following factors primarily support our determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- No mortality is anticipated or authorized;
- The takes from Level B harassment are expected to be due to potential behavioral disturbance;
- The effects of the research activities are expected to be limited to short-term startle responses and localized behavioral changes due to the short and sporadic duration of the research activities;
- The activities will partially take place in areas of significance for marine mammal feeding, resting, breeding, or pupping but due to their nature and duration are expected to not adversely impact marine mammal habitat or deny pinnipeds access to this habitat because of the large availability of alternate haulouts and short-duration of disturbance;

- Anecdotal observations and results from previous monitoring reports show that the pinnipeds returned to the various sites and did not permanently abandon haul-out sites after NPS conducted their research activities; and
- Harbor seals and Steller sea lions may flush into the water despite researchers best efforts to keep calm and quiet around these pinnipeds; however, injury or mortality has never been documented and is not anticipated from flushing events. GLBA NP researchers will approach study sites slowly to provide enough time for any marine mammals present to slowly enter the water without panic. SWAN researchers will attempt to conduct their surveys at a distance which is expected to not result in pinniped disturbance.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the monitoring and mitigation measures, NMFS finds that the total marine mammal take from the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers Analysis

As noted above, only small numbers of incidental take may be authorized under Section 101(a)(5)(D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals authorized to be taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

As mentioned previously, NMFS estimates that NPS' research activities, including gull monitoring, climate monitoring, and marine animal surveys, could potentially affect, by Level B harassment only, two species of marine mammal under our jurisdiction. For harbor seals, this annual take estimate is small relative to the three impacted stocks, ranging from 0.7 to 3.7 percent (See Table 1, Table 2, and Table 3). For Steller sea lions, this annual take estimate is small (400 sea lions) relative to the western stock (0.7 percent) or eastern stock (1.0 percent). In addition to this, there is a high probability in the GLBA NP activities that repetitive takes of the same animal may occur which reduces the percentage of population impacted even further.

Based on the analysis contained herein of the activity (including the mitigation and monitoring measures) and the authorized take of marine mammals, NMFS finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

Impact on Availability of Affected Species for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by the specified activities in GLBA NP, KATM, or KEFJ. Subsistence harvest is prohibited in these national parks and the nature of the activities means they should not affect any harvest occurring in nearby waters. There is possible pinniped harvest in KBAY, but the timing of the survey is removed from the peak seasons of harvest. Additionally, the disturbance to pinnipeds caused by NPS's activities is limited to non-lethal take by Level B harassment and is temporary and short in duration. Therefore, we have determined that the total taking of affected species or stocks is not expected to have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

National Environmental Policy Act (NEPA)

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216-6A, NMFS must review our proposed action (*i.e.*, the issuance of an incidental take authorization) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in CE B4 of the Companion Manual for NOAA Administrative Order 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that preclude this categorical exclusion. Accordingly, NMFS has determined that the issuance of these final regulations and subsequent Letters of Authorization qualifies to be categorically excluded from further NEPA review.

Endangered Species Act (ESA)

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of incidental take regulations and subsequent LOAs, NMFS consults internally, in this case with the Alaska Regional Office, whenever we propose to authorize take for endangered or threatened species.

NMFS is authorizing take of western DPS Steller sea lions, which are listed under the ESA.

NMFS's Office of Protected Resources has requested initiation of Section 7 consultation with NMFS's Alaska Regional Office for the issuance of this LOA. On March 1, 2019, NMFS

Alaska Region issued a Biological Opinion to NMFS Office of Protected Resources, which concluded that the NPS research and monitoring activities are not likely to jeopardize the continued existence of western DPS Steller sea lions or adversely modify critical habitat based on the nature of the activities.

Adaptive Management

The regulations governing the take of marine mammals incidental to NPS research and monitoring activities in GLBA NP and SWAN region contain an adaptive management component.

The reporting requirements associated with this rule are designed to provide NMFS with monitoring data from the previous year to allow consideration of whether any changes are appropriate. The use of adaptive management allows NMFS to consider new information from different sources to determine (with input from NPS regarding practicability) on an annual or biennial basis if mitigation or monitoring measures should be modified (including additions or deletions). Mitigation measures could be modified if new data suggests that such modifications are expected to have a reasonable likelihood of reducing adverse effects to marine mammals and if the measures are practicable.

NPS's monitoring program (see "Monitoring and Reporting") will be managed adaptively. Changes to the monitoring program may be adopted if they are reasonably likely to better accomplish the MMPA monitoring goals described previously or may better answer the specific questions associated with NPS's monitoring plan.

The following are some of the possible sources of applicable data to be considered through the adaptive management process: (1) results from monitoring reports, as required by MMPA authorizations; (2) results from general marine mammal and sound research; and (3) any

information which reveals that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOAs.

Classification

Pursuant to the procedures established to implement Executive Order 12866, the Office of Management and Budget has determined that this rule is not significant.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration at the proposed rule stage that this action will not have a significant economic impact on a substantial number of small entities. NPS is the sole entity that will be subject to the requirements in these regulations, and the NPS is not a small governmental jurisdiction, small organization, or small business, as defined by the RFA. No comments were received on this certification. Accordingly, a regulatory flexibility analysis is not required and none has been prepared.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid OMB control number. This rule does not contain a COI requirement subject to the provisions of the PRA because the applicant is a Federal agency.

Waiver of Delay in Effective Date

The Assistant Administrator for NMFS has determined that there is good cause under the Administrative Procedure Act (5 U.S.C 553(d)(3)) to waive the 30-day delay in the effective date of this final rule. No individual or entity other than NPS is affected by the provisions of these regulations. NPS has informed NMFS that it requests that this final rule take effect on or by

March 1, 2019, to accommodate NPS's research planned to begin March 1, 2019, with its current IHA expiring February 28, 2019, so as to not cause a disruption in planned research and monitoring activities. The request to authorize take for NPS activities in the SWAN region and resulted in delays in receiving a revised and complete application. NMFS was also unable to accommodate the 30-day delay of effectiveness period due to the need for additional time to address public comment and carry out required review, which was delayed by the partial Federal government shutdown in December 2018 and January 2019. The waiver of the 30-day delay of the effective date of the final rule will ensure that the MMPA final rule and LOAs are in place by the time the previous authorization expires. Any delay in finalizing the rule would result in either: (1) A suspension of planned research and monitoring, which would result in lost data and wasted funds; or (2) NPS's procedural non-compliance with the MMPA (should NPS conduct research and monitoring without LOAs), thereby resulting in the potential for unauthorized takes of marine mammals. Moreover, NPS is ready to implement the rule immediately. For these reasons, NMFS finds good cause to waive the 30-day delay in the effective date. In addition, the LOAs allow for authorization of incidental take of marine mammals that would otherwise be prohibited under the statute. Therefore the rule is granting an exception to NPS and relieving restrictions under the MMPA, which is a separate basis for waiving the 30-day effective date for the rule.

List of Subjects in 50 CFR Part 217

Exports, Fish, Imports, Indians, Labeling, Marine mammals, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation.

Dated: March 4, 2019.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

For reasons set forth in the preamble, 50 CFR part 217 is amended as follows:

PART 217 – REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

1. The authority citation for part 217 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*, unless otherwise noted.

2. Add subpart C to part 217 to read as follows:

Subpart C – Taking Marine Mammals Incidental to Research and Monitoring in Southern Alaska National Parks

Sec.

217.20 Specified activity and specified geographical region.

217.21 Effective dates.

217.22 Permissible methods of taking.

217.23 Prohibitions.

217.24 Mitigation requirements.

217.25 Requirements for monitoring and reporting.

217.26 Letters of Authorization.

217.27 Renewals and modifications of Letters of Authorization.

217.28 - 217.29 [Reserved]

Subpart C – Taking Marine Mammals Incidental to Research and Monitoring in Southern Alaska National Parks

§ 217.20 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the National Park Service (NPS) and those persons it authorizes or funds to conduct activities on its behalf for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occurs incidental to the NPS’s research and monitoring activities listed in the Letters of Authorization (LOA).

(b) The taking of marine mammals by NPS may be authorized in an LOA only if it occurs at Glacier Bay National Park (GLBA NP) or in the NPS’s Southwest Alaska Inventory and Monitoring Network (SWAN) sites.

§ 217.21 Effective dates.

Regulations in this subpart are effective from [*insert date of publication in the FEDERAL REGISTER*] through February 29, 2024.

§ 217.22 Permissible methods of taking.

Under LOAs issued pursuant to §§ 216.106 of this chapter and 217.26, the Holder of the LOA (hereinafter “NPS”) may incidentally, but not intentionally, take marine mammals within the area described in § 217.20(b) by Level B harassment associated with research and monitoring

activities, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

§ 217.23 Prohibitions.

Notwithstanding takings contemplated in § 217.20 and authorized by an LOA issued under §§ 216.106 of this chapter and 217.26, no person in connection with the activities described in § 217.20 may:

(a) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or an LOA issued under §§ 216.106 of this chapter and 217.26;

(b) Take any marine mammal not specified in such LOAs;

(c) Take any marine mammal specified in such LOAs in any manner other than as specified;

(d) Take a marine mammal specified in such LOAs if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(e) Take a marine mammal specified in such LOAs if NMFS determines such taking results in an unmitigable adverse impact on the species or stock of such marine mammal for taking for subsistence uses.

§ 217.24 Mitigation requirements.

When conducting the activities identified in § 217.20(a), the mitigation measures contained in any LOA issued under §§ 216.106 of this chapter and 217.24 must be implemented. These mitigation measures shall include but are not limited to:

(a) *General conditions.* (1) A copy of any issued LOA must be in the possession of NPS, its designees, and additional survey crew personnel operating under the authority of the issued LOA;

(2) Before all surveys, the lead NPS biologist must instruct additional survey crew on appropriate conduct when in the vicinity of hauled-out marine mammals. This training must brief survey personnel on marine mammals (inclusive of identification as needed, *e.g.*, neonates); and

(3) NPS must avoid interaction with any marine mammal species for which take is not authorized (or any species for which authorized take numbers have been met). For humpback, killer, and beluga whales, NPS must avoid operation of a motor vessel within 1/4 nautical mile of these cetaceans. If accidentally positioned within 1/4 nautical mile of these cetaceans, NPS must slow the vessel speed to 10 knots or less and maintain course away from the marine mammal until at least 1/4 nautical mile of separation exists;

(b) *Glacier Bay gull and climate monitoring.* (1) On an annual basis, NPS may conduct a maximum of five days of gull monitoring for each survey location listed in the LOA;

(2) On an annual basis, the NPS may conduct a maximum of three days of activities related to climate monitoring on Lone Island;

(3) NPS is required to conduct pre-survey monitoring before deciding to access a study site;

(4) Prior to deciding to land onshore, NPS must use high-powered image stabilizing binoculars before approaching at distances of greater than 500 m (1,640 ft) to determine and document the number, species, and location of hauled-out marine mammals;

(5) During pre-survey monitoring, vessels must maintain a distance of 328 to 1,640 ft (100 to 500 m) from the shoreline;

(6) If a harbor seal pup less than one week of age (neonate) is present within or near a study site or a path to a study site, NPS must not access the site nor conduct the study at that time. In addition, if during the activity, a pup less than one week of age is observed, all research

activities must conclude for the day;

(7) NPS must maintain a distance of at least 100 m from any Steller sea lion;

(8) NPS must perform controlled and slow ingress to islands where harbor seals are present;

(9) NPS must monitor for offshore predators at the study sites during pre-survey monitoring and must avoid research activities when killer whales (*Orcinus orca*) or other predators are observed within a 1 mile radius; and

(10) NPS must maintain a quiet working atmosphere, avoid loud noises, and must use hushed voices in the presence of hauled-out pinnipeds; and

(c) *SWAN marine bird surveys*. (1) On an annual basis, NPS may conduct one summer survey at each location listed in the LOA;

(2) On an annual basis, the NPS may conduct one winter survey at each location listed in the LOA;

(3) NPS must maintain a minimum vessel distance of 100 meters from the shoreline at all times while surveying; and

(4) If hauled out Steller sea lions or harbor seals are observed, NPS must maintain the vessel speed and minimum distance. If survey conditions allow, the survey must be attempted from a distance greater than 150 meters.

§ 217.25 Requirements for monitoring and reporting.

NPS is required to conduct marine mammal monitoring during research and monitoring activities. NPS and/or its designees must record the following for the designated monitoring activity:

(a) *Glacier Bay gull and climate monitoring*. (1) Species counts (with numbers of

adults/juveniles); and numbers of disturbances, by species and age, according to a three-point scale of intensity;

(2) Information on the weather, including the tidal state and horizontal visibility;

(3) The observer will note the presence of any offshore predators (date, time, number, and species); and

(4) The observer must note unusual behaviors, numbers, or distributions of pinnipeds, such that any potential follow-up research can be conducted by the appropriate personnel; marked or tag-bearing pinnipeds or carcasses, allowing transmittal of the information to appropriate agencies; and any rare or unusual species of marine mammal for agency follow-up. The observer must report that information to NMFS's Alaska Fisheries Science Center and/or the Alaska Department of Fish and Game Marine Mammal Program.

(b) *SWAN marine bird surveying*. (1) Species counts and numbers of type 3, flushing, disturbances;

(2) Information on the weather, including the tidal state and horizontal visibility; and

(3) The observer must note unusual behaviors, numbers, or distributions of pinnipeds, such that any potential follow-up research can be conducted by the appropriate personnel; marked or tag-bearing pinnipeds or carcasses, allowing transmittal of the information to appropriate agencies; and any rare or unusual species of marine mammal for agency follow-up. The observer must report that information to NMFS's Alaska Fisheries Science Center and/or the Alaska Department of Fish and Game Marine Mammal Program.

(c) *Annual reporting*. NPS must submit separate annual draft reports for GLBA NP and SWAN on all monitoring conducted within ninety calendar days of the completion of annual research and monitoring activities. Final reports for both GLBA NP and SWAN must be

prepared and submitted within thirty days following resolution of comments on each draft report from NMFS. This report must contain:

- (1) A summary and table of the dates, times, and weather during all research activities;
- (2) Species, number, location, and behavior of any marine mammals observed throughout all monitoring activities;
- (3) An estimate of the number (by species) of marine mammals exposed to acoustic or visual stimuli associated with the research activities; and
- (4) A description of the implementation and effectiveness of the monitoring and mitigation measures of the Authorization and full documentation of methods, results, and interpretation pertaining to all monitoring.

(d) *Comprehensive reporting.* NPS must submit a comprehensive 5-year report covering all activities conducted under the incidental take regulations at least 90 days prior to expiration of these regulations if new regulations are sought or 90 days after expiration of regulations.

(e) *Reporting of injured or dead marine mammals.* (1) In the unanticipated event that the activity defined in § 219.20(a) clearly causes the take of a marine mammal in a prohibited manner such as an injury (Level A harassment), serious injury, or mortality, NPS must immediately cease the specified activities and report the incident to the Office of Protected Resources, NMFS, and the Alaska Regional Stranding Coordinator, NMFS. The report must include the following information:

- (i) Time and date of the incident;
- (ii) Description of the incident;
- (iii) Environmental conditions (*e.g.*, wind speed and direction, Beaufort sea state, cloud cover, and visibility);

(iv) Description of all marine mammal observations and active sound source use in the 24 hours preceding the incident;

(v) Species identification or description of the animal(s) involved;

(vi) Fate of the animal(s); and

(vii) Photographs or video footage of the animal(s);

(2) Activities must not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with NPS to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. NPS must not resume their activities until notified by NMFS;

(3) In the event that NPS discovers an injured or dead marine mammal, and the lead observer determines that the cause of the injury or death is unknown and the death is relatively recent (*e.g.*, in less than a moderate state of decomposition), NPS must immediately report the incident to the Office of Protected Resources, NMFS, and the Alaska Stranding Coordinator, NMFS. The report must include the same information identified in paragraph (e)(1) of this section. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with NPS to determine whether additional mitigation measures or modifications to the activities are appropriate;

(4) In the event that NPS discovers an injured or dead marine mammal and determines that the injury or death is not associated with or related to the activities defined in § 217.20(a) (*e.g.*, previously wounded animal, carcass with moderate to advanced decomposition, scavenger damage), NPS must report the incident to OPR and the Alaska Stranding Coordinator, NMFS, within 24 hours of the discovery. NPS must provide photographs or video footage or other

documentation of the stranded animal sighting to NMFS. NPS can continue their research activities; and

(5) Pursuant to paragraphs (e)(2) through (4) of this section, NPS may use discretion in determining what injuries (*i.e.*, nature and severity) are appropriate for reporting. At minimum, NPS must report those injuries considered to be serious (*i.e.*, will likely result in death) or that are likely caused by human interaction (*e.g.*, entanglement, gunshot). Also pursuant to paragraphs (e)(3) and (4) of this section, NPS may use discretion in determining the appropriate vantage point for obtaining photographs of injured/dead marine mammals.

§ 217.26 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, NPS must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, NPS may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, NPS must apply for and obtain a modification of the LOA as described in § 217.27.

(e) The LOA shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.*, mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of an LOA shall be published in the **Federal Register** within 30 days of a determination.

§ 217.27 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under §§ 216.106 of this chapter and 217.26 for the activity identified in § 217.20(a) shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section); and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For an LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section) that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the **Federal Register**, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §§ 216.106 of this chapter and 217.26 for the activity identified in § 217.20(a) may be modified by NMFS under the following circumstances:

(1) *Adaptive management.* NMFS may modify (including augment) the existing

mitigation, monitoring, or reporting measures (after consulting with NPS regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA:

(A) Results from NPS's monitoring from the previous year(s).

(B) Results from other marine mammal research or studies.

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS shall publish a notice of proposed LOA in the **Federal Register** and solicit public comment.

(2) *Emergencies*. If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in LOAs issued pursuant to §§ 216.106 of this chapter and 217.26, an LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the **Federal Register** within thirty days of the action.

§§ 217.28 - 217.29 [Reserved]

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